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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

SOUTHERN INDIANA GAS & ELECTRIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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December 9, 1988

QUESTIONS PRESENTED

1. Whether employees under the National Labor Relations Act ("NLRA") can decide by themselves through a "Globe" self-determination election what the appropriate unit for collective bargaining should be in order for the National Labor Relations Board ("NLRB") to find an unlawful refusal to bargain in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), with respect to the new "globed" unit without having an appropriate unit determination made by the NLRB?

LIST OF PARTIES
RULE 28.1 LIST

The parties to the proceedings below were the Petitioner, Southern Indiana Gas and Electric Company of Evansville, Indiana, and the Respondent, the National Labor Relations Board of Washington, D.C.

Petitioner, Southern Indiana Gas and Electric Company, is an Indiana corporation and has no parent company, subsidiaries (other than wholly owned subsidiaries), or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Southern Indiana Gas and Electric Company ("SIGECO"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 853 F.2d 580, and is reprinted in the Appendix hereto, p. 1a, infra.

JURISDICTION

The judgment of the Court of Appeals (App. p. 1a, infra) was entered August 3, 1988, with a rehearing and rehearing in banc denied on September 13, 1988. This is reprinted in the Appendix hereto, p. 6a, infra. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 9 of the National Labor Relations Act, 29 U.S.C. 159(b), provides in part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the

> rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining. ...

STATEMENT OF THE CASE

A "Globe"[1] self-determination election was held on February 21, 1986, in the following "voting unit"[2] pursuant to a Stipulation for a Consent Election of Petitioner's employees:

> "All Disconnect/Bill Collectors at the Employer's Evansville, Indiana facility;
>
> BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and all salaried office workers."

---

1. Globe Machine & Stamping Co., 3 NLRB 294 (1937).

2. The parties all agreed that the fringe group of Disconnect/Bill Collectors was a "Voting Unit" but did not agree that this group constituted an appropriate collective bargaining unit.

The parties never stipulated in the Stipulation for a Consent Election to an appropriate collective bargaining unit and, in fact, in item 12 of the parties' Stipulation, the term the appropriate "collective bargaining" unit was crossed out by the NLRB Regional Director who substituted the term the appropriate "VOTING" unit.

The Globe election in this case (Appendix I to the Stipulation) provided:

APPENDIX I

> If a majority of valid ballots are cast for LOCAL UNION NO. 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC, they will be taken to have indicated the employees' desire to be included in the existing unit (All production, transmission and distribution employees of the Company, but excluding office and clerical employees, armed guards, supervisors), and currently represented by LOCAL UNION NO. 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC.

The production, transmission and distribution employees of the Petitioner

were under an existing collective bargaining agreement at the time of the Globe election and all relevant times thereafter.

A majority of valid ballots were cast indicating the Disconnect/Bill Collectors' desire to be included in the existing unit. On March 3, 1986, the NLRB Regional Director issued a Certification of Results of Election,[3] which in relevant part provides:

> . . .
>
> IT IS HEREBY CERTIFIED that the said organization may bargain for the employees in the above-named category as part of the group of employees which it currently represents ....

---

3. In a Globe election, when a majority of the voting fringe category of employees vote their desire to be included in an existing unit, a Certification of Results rather than a Certification of Representative is issued by the NLRB.

The NLRB has never made a finding or a determination that the Disconnect/Bill Collectors standing alone or combined with the current production, transmission and distribution employees (covered by an existing collective bargaining agreement) were an appropriate collective bargaining unit or units and a Certification of Representative covering either unit was never issued by the NLRB.

Pursuant to the Certification of Results of Election of March 3, 1986, Petitioner entered into collective bargaining negotiations for the category of employees of Disconnect/Bill Collectors to negotiate under what terms and conditions of employment the Disconnect/Bill Collectors would be placed under the existing collective bargaining unit of production, transmission and distribution employees.

At the conclusion of the second collective bargaining session on April 11, 1986, the union broke off further negotiations because SIGECO would not agree to automatically cover the Disconnect/Bill Collectors category of employees with its current collective bargaining agreement which only covered the existing collective bargaining unit. The NLRB, in its Decision and Order, found that SIGECO:

> "... violated Section 8(a)(5) of the Act by refusing to recognize the Union as the exclusive collective-bargaining representative of its employees in the expanded unit, including the 'Globed' disconnect/bill collector employees, and by refusing to bargain on that basis."

The Board reversed the Administrative Law Judge on his order that Petitioner automatically apply the existing collective bargaining agreement to the disconnect/bill collectors and stated "we

do not agree with the judge that the 'Globed' employees come automatically under the terms of the existing collective-bargaining agreement" citing H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970) and holding:

> "Thus, we hold that, although in future negotiations for a new contract the parties in such circumstances must bargain over the unit as a whole, initially either party is free to reject immediate application of an existing contract to the newly represented employees and may bargain separately over their terms and conditions of employment. ..."

Thus, the NLRB upheld the Petitioner's separate bargaining over the terms and conditions of employment covering the Disconnect/Bill Collectors. Although the Board found that Petitioner refused to recognize and bargain with the expanded unit, it never certified the union as the exclusive representative of

Petitioner's employees in the expanded unit.

The Court of Appeals enforced the Board's Decision and Order and found that "the stipulation left it to the collectors themselves to decide by the self-determination election only whether they would be represented as a new part of the existing unit, or remain unrepresented."

REASONS FOR GRANTING THE WRIT

The question presented in this case is of considerable practical importance to the administration of the National Labor Relations Act and the NLRB's procedure in unit certification pursuant to Section 9(b) of the Act. The decision of the Court of Appeals conflicts not only with the Court of Appeals for the Seventh Circuit's own decisions in

Marshall Field & Co. v. NLRB, 135 F.2d 391 (7th Cir. 1943) and NLRB v. Weyerhaeuser Company, 276 F.2d 865 (7th Cir. 1960), and it also conflicts with the Court of Appeals for the Third Circuit decision in United Glass & Ceramic Workers of N.A., AFL-CIO-CLC v. NLRB, 463 F.2d 31 (3rd Cir. 1972), but more importantly it is contrary to this Court's holding in Pittsburgh Plate Glass Co. v. NLRB (1941), 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251, holding that the wishes of the employees are only one factor in the Board's determination of an appropriate bargaining unit.

It is contrary to the Act, and well-settled case law dictates that the NLRB may not delegate to the employees its duty to determine an appropriate collective bargaining. Simply stated,

the results of a Globe self-determination election cannot substitute for an appropriate unit determination but is only one factor to be looked to by the NLRB in making such determination.

In Marshall Field & Co. v. NLRB, 135 F.2d 391 (7th Cir. 1943), that Court of Appeals set forth the general doctrine concerning Globe elections as not substituting for NLRB unit determinations as follows:

> [1] (1) The failure of the Board to designate the unit before holding the election. The Board should have decided upon the unit or units appropriate for collective bargaining, before it called an election (Section 9(b); Pittsburgh Glass Co. v. National Labor Relations Board, 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251; Report of the Senate Committee, No. 573, 74th Congress 1st Session, page 14).
>
> [2] (2) The Board may not delegate the selection of the bargaining unit to the employees. While the wishes of the employees may be considered,

> the Board should not and, under the statute, can not leave this determination to either the employer or the employee.

Further, the Third Circuit Court of Appeals in United Glass & Ceramic Workers of N.A., AFL-CIO-CLC v. NLRB, 463 F.2d 31 (3rd Cir. 1972), found that absent a finding of mutually appropriate units, the Board by conducting a self-determination election to determine the appropriate unit improperly delegates to the employees its statutory obligation to determine the appropriate unit. Also, the Court of Appeals for the Seventh Circuit in NLRB v. Weyerhaeuser Co., 276 F.2d 865 (7th Cir. 1960), held that the procedure for using a self-determination election in determining an appropriate unit is for the Board to first establish what is the appropriate collective bargaining unit thereby determining whether the unit with the

fringe group would be an appropriate unit before the election and then conducting the election.

If employees through self-determination Globe elections were allowed to make unit determinations, the Board, for example in hospital bargaining unit determinations (currently in the NLRB rulemaking process), could simply allow the employee group in question to make their own unit determination if they wanted to be combined with another group of employees without the Board making the statutorily mandated unit determination. Contrary to the court of appeals, the NLRB and not "the collectors themselves" should have made the requisite unit determination taking into consideration, as one factor, the desires of the Disconnect/Bill Collectors to be represented by the union as part of the

expanded unit. This is required by Section 9(b) of the NLRA.

The Seventh Circuit has thus created a confusing precedent, likely to generate even further confusion among the other circuits. It is a precedent that is also directly at odds with this Court's ruling in Pittsburgh Plate Glass Co. v. NLRB (1941), 313 U.S. 146. Plenary consideration of the use of a "Globe" self-determination election by the NLRB to substitute for a unit determination is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 1988

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-2477

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

ARGUED MARCH 31, 1988—DECIDED AUGUST 3, 1988

Before WOOD, JR., POSNER, and EASTERBROOK, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Petitioner, National Labor Relations Board, seeks to enforce its order against Respondent, Southern Indiana Gas and Electric Company, located in Evansville, Indiana. The Board's order required the company to cease and desist from its unlawful conduct and from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their statutory rights. In particular the order requires the company to bargain with the union in the unit found appropriate and to post a remedial notice.

The company is a public utility, which supplies electricity and natural gas to its customers. Beginning in 1944

the company's production, transmission, and distribution employees, presently numbering about 550, have been represented by Local Union No. 702, International Brotherhood of Electrical Workers and have worked under a series of negotiated collective bargaining agreements.

There are, however, two or three employees referred to as disconnect/bill collectors who are not union members and whose positions are not covered by the collective bargaining agreement. This case involves only the union's representation of two or three employees. Considering the size of this group and the obvious lack of merit in the company's position, we do not understand why the company has stubbornly refused to comply with the Board's order that it treat these two or three employees as members of the existing 550-member unit. Bringing this minimal case into this court is a waste of resources; a public utility should demonstrate greater public responsibility. This court directs that the Board's order be enforced forthwith in all particulars.

I. FACTUAL BACKGROUND

In September, 1985, the union filed a petition with the Board seeking to represent the two or three collectors. In October the parties entered into a Stipulation for Certification Upon Consent Election. This stipulation provided for a self-determinative election to give the collectors an opportunity to say whether they would like to join the existing bargaining unit, or whether they preferred to remain unrepresented. The Board conducted the election for the three eligible voters, and the result was a unanimous choice to join the existing bargaining unit. An objection followed, which resulted in another stipulation for a rerun election under the same terms and conditions as the first. In February, 1986, the Board conducted the second election, and again the result was an overwhelming unanimous vote of three for the union. Thereafter, in March, 1986, the Regional Director certified the results of the election and provided that the union "may bargain" for the col-

lectors as part of the group of employees in the original unit, which the union currently represented.

That same month bargaining began. The union sought to bargain about contract provisions for the collectors' wages, layoffs, promotions, and other issues. The company came to the table only to negotiate a separate and distinct agreement for the collectors, who would constitute a separate and distinct bargaining unit. The company would not recognize the three collectors to be a part of the existing unit for the other employees, but sought to create a separate unit for these three collectors. The union responded that the issue of whether the collectors were part of the existing unit had been decided by the election, and the collectors were now part of that unit. The company disputed that was what the election meant. It was the company's position that the Board had never certified that the union in fact represented the collectors as part of the existing unit but had only certified that the union "may" bargain for the collectors. Further, it was the company's position that there had been no actual findings that the collectors were part of the existing unit. Negotiations ceased, and in June, 1986, the union filed an unfair labor practices charge, alleging that the company's refusal to bargain with the collectors as part of the existing unit pursuant to the election violated the National Labor Relations Act.[1] The company responded that its position was correct, as the union had never been properly certified as the bargaining representative of the existing unit as augmented by the two or three collectors.

An administrative law judge held a hearing and in relevant part found that the company was in violation of section 8(a)(1) and (5) of the Act[2] because of its refusal to bargain with the union concerning the collectors inclusion in the existing unit. The Board agreed and now seeks the enforcement of its order.

---

[1] 29 U.S.C. §§ 1-651.

[2] 29 U.S.C. § 158(a)(1), (5).

II. DISCUSSION

We understand the company's position to be that the Board failed to make a determination that the existing unit was the appropriate unit to bargain for the collectors because the Board improperly delegated to the employees through a *Globe* self-determination election its statutory obligation to make the determination. In a *Globe* election, the name adopted from *Globe Machine & Stamping Co.*, 3 N.L.R.B. 294 (1937),[3] fringe group employees are accorded the opportunity to choose between being represented as their own distinct group or being represented as part of the existing larger unit. The company now says that its position was not that the collectors had to be a separate unit, only that the company was willing to bargain over which unit was designated to bargain for the collectors.

It may be helpful to review the usual procedures followed when a union representing most of the employees petitions to represent some fringe employees. The Board begins a two-step process. First, the Board conducts a representation proceeding to determine whether the larger existing unit together with the fringe employees would constitute an appropriate bargaining unit. The appropriateness of the unit's representation may be contested,[4] which it appears the company seeks to do by belatedly trying to bargain with the union about it. The initial hearing about the appropriate unit, however, may be waived by stipulation between the parties.[5] Once the parties enter into a stipulation of that nature the parties are bound by their

[3] *See NLRB v. American Printers & Lithographers*, 820 F.2d 878, 880 (7th Cir. 1987), *enforcing* 275 N.L.R.B. 1490 (1985); *Federal-Mogul Corp.*, 109 N.L.R.B. 343 (1974).

[4] *See* section 9(c)(1) of the Act (29 U.S.C. 159(c)(1)) and section 102.62-.69 of the Board's Rules and Regulations, series B as amended (29 C.F.R. § 102.62-.69).

[5] *See* section 9(c)(4) of the Act (29 U.S.C. § 159(c)(4)) and section 102.62 of the Board's Rules and Regulations.

agreement unless it violates the Act or Board policy. In the present case a stipulation was entered into. The representation proceeding was therefore rendered unnecessary. The second step of the process is a self-determination election to give the fringe employees their choice, whether they preferred to be represented by the existing unit, which in this case has been stipulated to be an appropriate unit, or whether they preferred to remain unrepresented.

The company seeks to avoid the clear impact of the stipulation it admittedly entered into and engages in extraneous arguments which are not applicable in view of that stipulation. We therefore need not pursue those arguments in this opinion. The company stipulated away any right it had to contest or negotiate about the appropriate bargaining unit. The stipulation left it to the collectors themselves to decide by the self-determination election only whether they would be represented as a new part of the existing unit, or remain unrepresented. If the majority of the collectors did not choose the existing unit, that would indicate that the collectors preferred to continue unrepresented as they had been in the past. By the election, however, the collectors chose to become a part of the existing unit. That was the end of that phase. Therefore the company was bound by the stipulation and the self-determination election to accept the existing unit and to begin the negotiations about the matters the union originally sought to negotiate with the company on behalf of the collectors. That should have been done over two years ago for this small group of employees without the expenditure of the time, money and effort of the parties, and the intervention of this court.

ENFORCED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

September 13, 1988

BEFORE

HON. HARLINGTON WOOD, JR., Circuit Judge

HON. RICHARD A. POSNER, Circuit Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

No. 87-2477	)	
	)	On Application For
NATIONAL LABOR	)	Enforcement of an
RELATIONS BOARD,	)	Order of the National
Petitioner,	)	Labor Relations Board
	)	
v.	)	
	)	
SOUTHERN INDIANA	)	
GAS AND ELECTRIC	)	
COMPANY,	)	
Respondent	)	

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause on

August 16, 1988, by respondent Southern Indiana Gas and Electric Company, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.